

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

GRUMA CORPORATION d/b/a MISSION FOODS

and

**Cases 04-CA-199438
04-CA-202091 and
04-CA-209548**

**UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 1776**

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S EMERGENCY
MOTION TO RESCHEDULE HEARING**

The General Counsel opposes the Emergency Motion to Reschedule Hearing filed by Gruma Corporation d/b/a Mission Foods (Respondent) on December 5, 2017. Respondent has failed to provide an adequate reason to reschedule the hearing. General Counsel therefore asks that the hearing proceed as scheduled.

The Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Consolidated Complaint) on October 31, 2017, in which he notified Respondent that the hearing in this matter would begin on December 18, 2017 in Scranton, Pennsylvania. On November 14, 2017, Respondent filed a Motion to Reschedule Hearing with the Regional Director pursuant to Section 102.16(a) of the Board's Rules and Regulations, which the Regional Director denied on November 15, 2017. On December 1, 2017, the Regional Director issued an Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing that left the hearing date and location unchanged.

In its Emergency Motion, Respondent asserts the hearing should be rescheduled for the following reasons. First, the hearing is scheduled to begin the week prior to Christmas Day week

and during Chanukah. Second, Fred Grubb, whom Respondent plans to call as a witness, will be hosting family members at his home in Vermont from December 18, 2017 through January 4, 2018. Third, Frank Davis, whom Respondent plans to call as a witness in the present case, was to play some undefined role in the hearing before the Administrative Law Judge in Case 28-CA-197261, in which the General Counsel alleged that Respondent committed multiple unfair labor practices with regard to its facility in Tempe, Arizona. The hearing in that case was scheduled to begin on December 12, 2017 in Phoenix, Arizona. Fourth, the current hearing date “creates significant operational issues for Respondent.” And, finally, one of Respondent’s attorneys, Fito Agraz, recently suffered health problems that may interfere with his ability to represent Respondent in the present matter. These reasons do not justify rescheduling the hearing in this case.

Respondent’s first objection warrants little comment: the Board may properly hold a hearing during the week prior to the week in which Christmas Day falls and during Chanukah.

Turning to Respondent’s second objection, witness Grubb’s desire to spend the second half of December and early January at home with family members is not reason to delay the Board’s processing of this case, in which Respondent is alleged to have committed extremely serious unfair labor practices, including discharging employees for their union activity, bargaining in bad faith with a newly selected union, and unlawfully withdrawing recognition from that union, among others. See *Greenpark Care Center*, 236 NLRB 683, 683 fn. 3 (1978) (respondent’s key witness simply choosing to go on vacation abroad at the time of the hearing was not grounds for an adjournment). There is a strong public interest in these allegations receiving a prompt hearing. Grubb’s personal desires cannot stand in the way of that interest.

Furthermore, Respondent can compel Grubb to appear at the hearing through a Board subpoena, as authorized by Sections 11(1) and (2) of the Act and Section 102.31 of the Board’s Rules and Regulations. Although Respondent represents in its Emergency Motion that Grubb told

Respondent's counsel on December 1, 2017 that Grubb would disregard a Board subpoena, the statement of Grubb himself attached to said motion contains no similar declaration of intent to defy the Board. This suggests Grubb may ultimately decide to respect the Board's subpoena authority. In any event, if Grubb follows through on his pledge to ignore the Board, the Act and the Board's Rules and Regulations establish procedures for enforcing the Board's subpoenas in federal court. See 29 USC § 161(2); 29 CFR § 102.31(d).

As to Respondent's third objection—that the hearing regarding the alleged unfair labor practices committed by Respondent in Case 28-CA-197261 created a conflict for Respondent witness Davis—Counsel for the General Counsel has been administratively advised that, on December 5, 2017, the Acting Regional Director for Region 28 conditionally approved the December 3, 2017 request of the charging party in that case to withdraw the charge pursuant to a non-Board settlement entered into by Respondent and said charging party on December 1, 2017. The Acting Regional Director for Region 28 accordingly vacated the notice of hearing in Case 28-CA-197261. Therefore, the conflict Respondent claimed Davis had no longer exists.

Respondent's fourth asserted reason for postponing the hearing is that the current date "creates significant operational issues for Respondent." While Respondent provides no further explanation in its Emergency Motion, its November 14, 2017 Motion to Reschedule Hearing, which Respondent incorporates in its Emergency Motion by reference, states that (1) an audit is taking place at the Employer's facility in Mountain Top, Pennsylvania (the facility at issue in the present case) from December 11, 2017 through December 15, 2017; (2) a different audit is taking place at the same facility on December 18, 2017; and (3) "there are many scheduled vacations during the weeks before and after Christmas, while the plant is also at high production volume." Respondent does not explain how holding the hearing as currently scheduled will impact the identified events and conditions. Respondent's vague concern that the hearing date will create

“operational issues” for it does not justify rescheduling the hearing. Indeed, even if the hearing’s current date did inconvenience Respondent in some way, such inconvenience would not justify delaying the Board’s enforcement of the Act.

Finally, the health problems of one of Respondent’s attorneys, although regrettable, are not grounds for rescheduling the hearing under applicable law. The Board has upheld an Administrative Law Judge’s denial of a respondent’s request for a continuance due to the illness of its attorney where there “was sufficient time for the firm representing Respondent to arrange for substitute counsel” and substitute counsel had sufficient time to familiarize himself or herself with the case. See *Franks Flower Express*, 219 NLRB 149, 149 (1975), *enfd.* mem. 529 F.2d 520 (5th Cir. 1976); see also *Wittek Industries, Inc.*, 313 NLRB 579, 579 (1993) (upholding judge’s denial of respondent’s request for postponement due to unavailability of its attorney where respondent’s corporate legal counsel was available and had at least some familiarity with the case).

Here, Respondent notified the General Counsel as early as October 31, 2017—the date the initial Consolidated Complaint issued and almost seven weeks before hearing—that another attorney from Agraz’s law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (“Ogletree”), Charles Engeman, would be representing Respondent in the present case. Engeman filed a formal notice of appearance on November 14, 2017, the same date on which he filed Respondent’s Answer to the Consolidated Complaint and several motions on Respondent’s behalf; Engeman is the only signatory on all of these filings. Furthermore, according to its website, Ogletree has 52 offices in 28 states and hundreds of attorneys. In these circumstances, where another attorney will have been actively working on the case for almost seven weeks by the time of hearing and the law firm representing Respondent has hundreds of attorneys at its disposal, the possible unavailability of one attorney is not grounds for rescheduling the hearing. See *ibid.*

For the foregoing reasons, the General Counsel requests that Respondent's Emergency Motion be denied and the hearing proceed as scheduled.

Respectfully submitted,

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Dated: December 5, 2017